No. 13869

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JAY COMPANY, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

PETITION FOR REHEARING

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PETITION FOR REHEARING

The National Labor Relations Board respectfully petitions this Court for a rehearing of that part of its decision of July 2, 1954, which set aside paragraph 1 (e) of the Board's remedial order, a provision designed to protect respondent's employees from further unlawful acts of interference, restraint and coercion by respondent. The Court, while sustaining the Board's findings of unfair labor practices, eliminated the said paragraph on the ground that "A blanket restraint is unwarranted" because "The evidence does not show extensive antiunion activities or activities of an aggravated character evincing an attitude of general opposition to rights of employees." We believe, however, that in so modifying the Board's order, the Court may have overlooked two important con-

siderations, discussed immediately below. These considerations were not presented to the Court in the briefs heretofore filed because, as appears *infra,* we were not aware that the scope of the order was in issue.

1. Under Section 10 (e) of the Act and the decisions of the Supreme Court and this Court, the validity of that paragraph of the Board's remedial order was not before this Court in the instant case. That Section provides that "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

In his Intermediate Report (R. 56–57), the Trial Examiner found that the character and scope of respondent's unfair labor practices warranted the issuance of the remedial provision which this Court has refused to enforce. At no time, however, did respondent expressly urge before the Board that such a provision was improper.[1] Indeed, no such conten-

[1] Respondent's exception "To the matter appearing from line 14, page 10, to line 10, page 13" of the Intermediate Report (R. 63, item 14) does not satisfy the requirement of Section 10 (e) that the objection be sufficiently explicit to afford the Board "opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field & Co.* v. *N. L. R. B.*, 318 U. S. 253, 256. The above quoted exception was merely a *pro forma* objection, in general terms, to all of the Trial Examiner's recommendations (R. 58–60), and was not referred to in any manner in respondent's brief to the Board. "Such a general exception did not apprise the Board that [respondent] intended to press the question now presented" (*id.* at p. 255), and accordingly has not preserved for review any question relating to the scope of the

tion was made even in respondent's brief to this Court. Since no extraordinary circumstances are apparent which would excuse the failure to object to that part of the order, the propriety thereof would appear to be outside the area of contest on this review. See *N. L. R. B.* v. *Cheney California Lumber Co.*, 327 U. S. 385; *N. L. R. B.* v. *Marshall Field & Co.*, 318 U. S. 253, 255–256; *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 350; *N. L. R. B.* v. *Pinkerton's National Detective Agency, Inc.*, 202 F. 2d 230, 233 (C. A. 9); *N. L. R. B.* v. *Van de Kamp's Bakeries*, 154 F. 2d 828 (C. A. 9); *N. L. R. B.* v. *Kinner Motors, Inc.*, 154 F. 2d 1007 (C. A. 9).[2]

In the *Cheney California* case, *supra*, this Court had modified the Board's order by eliminating therefrom a remedial provision virtually identical with that involved in the case at bar. Because the company had not objected to the provision before the Board, however, the Supreme Court reversed the modification, holding (327 U. S. at 389):

> * * * Justification of such an order, which necessarily involves consideration of the facts which are the foundation of the order, is not open for review by a court if no prior objection has been urged before the case gets into court and there is a total want of extraordinary circumstances to excuse "the failure or

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order. See also *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 350; *N. L. R. B.* v. *Van de Kamp's Bakeries*, 154 F. 2d 828 (C. A. 9); *N. L. R. B.* v. *Kinner Motors, Inc.*, 154 F. 2d 1007 (C. A. 9).

[2] Cf. *N. L. R. B.* v. *Noroian*, 193 F. 2d 172 (C. A. 9); *N. L. R. B.* v. *Auburn Curtain Co.*, 193 F. 2d 826 (C. A. 1); *N. L. R. B.* v. *Pugh & Barr*, 194 F. 2d 217 (C. A. 4).

> neglect to urge such objection * * *" Congress desired that all controversies of fact, and the allowable inferences from the facts, be threshed out, certainly in the first instance, before the Board. That is what the Board is for. It was therefore not within the power of the court below to make the deletion it made.

Similarly in the *Pinkerton* case, *supra,* this Court held that where no question of the validity of a particular contract had been raised before the Board, the Court could not *sua sponte* consider the question and reverse the Board's finding of invalidity, even though the Court in another proceeding held that a similar contract was valid. And in both the *Van de Kamp* and *Kinner* cases, 154 F. 2d at 828 and 1007, this Court, which had originally declined to enforce the "broad" provisions of the Board's orders in those cases, reconsidered the matter and enforced the orders in full in accordance with the *Cheney* case.

We therefore submit that since the propriety of paragraph 1 (e) of the Board's order was not raised before the Board, and since presentation of that question to the Board was "a prerequisite to judicial review" (*Pinkerton* case, 202 F. 2d at 233), the Court should reconsider its decision and should enforce that provision of the Board's order.

2. We further submit that even if the propriety of the Board's order were properly before the Court, the order should be enforced in full, since it constituted a reasonable exercise of the Board's authority "to prevent violations, the threat of which in the future is indicated because of their similarity or re-

lation to those unlawful acts which the Board has found have been committed by the employer in the past." *N. L. R. B.* v. *Express Pub. Co.,* 312 U. S. 426, 436–437.

The serious nature of the unfair labor practices which the Board and this Court found respondent to have committed fully warrant the Board's determination that a broad cease and desist order is necessary "to prevent the employer * * * from engaging in any unfair labor practice affecting commerce." *May Dept. Stores* v. *N. L. R. B.,* 326 U. S. 376, 390. As this Court has recognized, respondent advocated the formation of a company union,[3] entered into and enforced an illegal union security agreement with such a union, discharged an employee for his role in disbanding the company union, locked out its employees, and threatened to close the plant unless the company union was reestablished. In short, the Company acted in flagrant disregard of the employees' rights guaranteed by Section 7,[4] and the Board could therefore properly find that "danger of [violation of that Section] in the future is to be anticipated from the course of [the employer's] conduct in the past." *N. L. R. B.* v.

[3] Respondent also promised benefits to the employees if they would form their own union rather than affiliate with an "outside union" (R. 47, 66; 172–173).

[4] Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all of such activities * * *."

Express Pub. Co., 312 U. S. 426, 437.[5] It follows that the order prohibiting future violations of that Section was entirely proper. See *N. L. R. B.* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 752, where this Court stated:

> Because of the coercive practices discussed * * * above the Board anticipated possible future misconduct on respondent's part, and accordingly ordered it to cease and desist from infringing in any manner any right guaranteed. In view of the conclusion we have reached [sustaining the finding of coercive practices], we are not able to say that the omnibus order is unwarranted.

Cf. *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 192–193, cautioning against decrees "so narrow as to invite easy evasion." In this connection it should be noted that the order as modified by the Court contains no prohibition whatsoever against "interference, restraint, or coercion," notwithstanding that respondent by the conduct summarized above plainly committeed acts which interfered with, restrained, and coerced the employees.[6]

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[5] In *Express Publishing* the Supreme Court, in holding that a broad order was inappropriate, stated that a contrary result had been properly reached in cases where "the unfair labor practices did not appear to be isolated acts in violation of the right of self-organization, like the refusal to bargain here * * *" 312 U. S. at 437–438. Respondent's numerous violations in this case can scarcely be characterized as an "isolated act."

[6] We respectfully suggest that *N. L. R. B.* v. *Nesen*, 211 F. 2d 559 (C. A. 9), which is cited to support the modification of the order in this case, does not require such a result. In *Nesen* the court's original decree, entered on consent, contained a broad cease and desist order. See decree in No. 13204 on the docket of this Court. In subsequent proceedings the Court found Nesen in contempt of other provisions of the decree. Nesen's violation of

Accordingly, even if the propriety of the Board's order were open to review, we submit that it can fairly be said that the violations enjoined by the Board "bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." *Express Publishing, supra,* 312 U. S. at 437.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for rehearing be granted, and that upon rehearing the Court enforce the Board's order in full as prayed in the petition for enforcement.

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the broad order was not in issue in the contempt proceeding. Similarly we are not concerned here with the court's power to shape its remedy in contempt proceedings.

CERTIFICATE OF COUNSEL

A. Norman Somers, Assistant General Counsel of the National Labor Relations Board, certifies that he has read and knows the contents of the foregoing petition and that said petition is filed in good faith and not for purposes of delay.

A. NORMAN SOMERS,
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WASHINGTON, D. C., *July 26, 1954.*

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